IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. HOWARD M. VAUGHN, Appellant.	No. 37107-3-II UNPUBLISHED OPINION

Penoyar, J. — Howard Vaughn appeals his convictions of attempting to elude a pursuing police vehicle,[1] bail jumping,[2] and first degree driving with license suspended.[3] He claims that he was denied his right to effective assistance of counsel because trial counsel failed to make a record of several side-bar conferences during trial. Pro se, he argues that several jury instructions impermissibly eased the State's burden of proof and that the trial court erred in allowing an impermissibly suggestive photographic identification into evidence. We affirm.

Facts

On December 20, 2005, Lakewood Police Officer Viengsavanh Sivankeo was waiting for a stoplight on South Tacoma Way while traffic on 108th Street had the right of way. He had just learned from dispatch that a "snatch, grab, and run" shoplifting incident had taken place at a local retailer and the suspects had fled in a black pickup truck with what appeared to be license number S80429X. Report of Proceedings (RP) at 29.

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[1] A violation of RCW 46.61.024(1).

[2] A violation of RCW 9A.76.170(3)(c) and RCW 9A.76.170(1).

[3] A violation of RCW 46.20.342(1)(a).

While waiting for the stoplight, Sivankeo saw a black pickup truck with a dark canopy turn right off of 108th Street onto southbound South Tacoma Way. The truck continued southbound and then took a sudden u-turn, forcing other drivers to brake to avoid a collision. As the truck continued northbound on South Tacoma Way through the 108th Street intersection, Sivankeo observed three people, shoulder to shoulder, in the cab. He looked directly at the driver and the driver looked at him, "his eyes got pretty big," and he sped up. RP at 33.

Sivankeo activated his lights and siren, made a u-turn, and followed the pickup as it turned eastbound on SR 512. The pickup pulled over to the side of the road, where Sivankeo reported the license plate number as A80429X, which dispatch confirmed was the truck used in the shoplifting incident. When Sivankeo approached the driver, the pickup sped away. Sivankeo then pursued the pickup onto I-5 northbound as it recklessly changed lanes, cut off other drivers, and then exited the freeway across four lanes of traffic, nearly causing multiple accidents. Sivankeo then terminated the pursuit and left the freeway on the next exit, 72nd Street.

Sivankeo learned that the pickup was registered to Timothy McCray, a lifetime Pierce County resident, and so he went to McCray's home. McCray told Sivankeo that he had lent his pickup to his daughter, who was homeless, and that the man driving was probably Howard Vaughn, a possessive, controlling drug user, who could not care for his own children. When Sivankeo returned to his police car, he brought up a booking photograph of Vaughn and recognized Vaughn as the driver he had seen while at the stoplight on South Tacoma Way. He also learned that Vaughn had a suspended driver's license.

On May 19, 2006, the State charged Vaughn with attempting to elude a pursuing police

vehicle and third degree driving while in suspended or revoked status. After multiple continuances, trial was set for January 24, 2007, on felony eluding and DWLS charges. Melody Crick, a deputy prosecuting attorney, was the barrel deputy at the superior court that day and called out Vaughn's name for trial three times between 9:00 and 10:00 a.m. Vaughn did not respond and the court issued a bench warrant that same day. Vaughn also missed a scheduled hearing to quash the warrant. Vaughn's trial began on July 24, 2007, where he faced an additional charge of bail jumping.

Sivankeo testified as set out above. McCray testified that he had loaned his truck to his daughter and was trying to get it back at that time because she was allowing several different people to drive it. McCray explained that after Sivankeo's December 20 visit, he reported the truck as stolen and discovered it abandoned 2 or 3 days later. He testified that he had seen Vaughn driving the pickup but not on December 20.

James Stewart, a lifelong friend of Vaughn's, testified that Vaughn was with him December 20 the entire day working at an apartment complex that he managed. He testified that an apartment resident gave Vaughn a ride home around 4:30 or 5:00 p.m. that day. Stewart testified that he noticed a police officer in the parking lot and approached him to see if there was a problem that needed attention. The officer explained that he was looking for Vaughn, to which Stewart responded that Vaughn had been with him all day and had just gone home.

Vaughn's testimony was similar to Stewart's as to his whereabouts that December day. He testified that he did not have a car, that he spent the night at his mother's in North Tacoma, and that Stewart had picked him up at 7:30 that morning for work. As to the January 24, 2007

trial date, Vaughn explained that he was staying with Stephanie Johnson, a friend living in Des Moines, and she had agreed to give him a ride to the court house. When they went to leave, however, her car slipped into neutral, rolled down the driveway, and collided with an abandoned car. Her car immediately began steaming and overheating and could not be driven. Vaughn testified that he called several people to try to get a ride to court but was unsuccessful and finally called his trial attorney to explain that he would not make it to trial.

Finally, Stephanie Johnson testified similarly to Vaughn on what transpired that January morning and why Vaughn could not make it to the court house for trial.

The jury returned guilty verdicts on all three charges and the court imposed standard range concurrent sentences, the longest being 51 months' incarceration for the bail jumping conviction.

Analysis

I. Effective Assistance of Counsel

Vaughn argues that he was denied his right to effective assistance of counsel because trial counsel failed to make a record of six sidebar conferences the trial attorneys had with the trial judge. He claims that this failing could serve no tactical purpose and effectively denied him his constitutional right to appellate review.

The test for ineffective assistance of counsel has two parts. One, the defendant must show that defense counsel's conduct was deficient, *i.e.*, that it fell below an objective standard of reasonableness. Two, the defendant must show that such conduct caused actual prejudice, *i.e.*, that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)

(adopting test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

The State responds that Vaughn cannot show prejudice because the record does not show what actually occurred in the sidebar conferences.[4] It argues that it was incumbent on Vaughn to bring evidence before this court to show what occurred in those conferences and to do so, if necessary, through a personal restraint petition, which he could have filed concurrently with the appeal. *See State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

We agree. We also note that while RAP 9.3 and 9.4 do not strictly apply under these circumstances, counsel could have sought permission from this court to file an agreed or narrative report of proceedings in order to supplement the appellate record. *See* RAP 1.2(c). He failed to do so and as such we can only rely on speculation or conjecture, which will not support an ineffective assistance of counsel claim.

Vaughn relies on *State v. Koloske*, 100 Wn.2d 889, 896, 676 P.2d 456 (1984), but it does not help Vaughn show prejudice. In *Koloske,* the trial court had made a tentative pretrial ruling on the admission of ER 609 evidence and during trial apparently made its final ruling in an unrecorded sidebar. 100 Wn.2d at 896. The *Koloske* court warned that such practice *may* preclude review:

> We realize that the purpose of an unrecorded sidebar conference is to dispose quickly of uncomplicated issues without repeatedly removing the jury from the courtroom. But the danger of such conferences cannot be overemphasized. Failure to record the resulting ruling may preclude review.

Koloske, 100 Wn.2d at 896.

[4] There were seven sidebar conferences. No record was made about six of them.

Vaughn also relies on *State v. Ermert*, 94 Wn.2d 839, 621 P.2d 121 (1980), but it also does not help Vaughn show prejudice. There the court found ineffective assistance of counsel because counsel failed to object to a legally incorrect to-convict instruction. *Ermert*, 94 Wn.2d at 849-50. The court found this was prejudicial because had the court given a proper instruction, the evidence was insufficient to support a conviction. *Ermert*, 94 Wn.2d at 851; *see also State v. Hicks*, 163 Wn.2d 477, 488, 181 P.3d 831 (2008) (counsel's failure to object to comment that this was a non-capital case was deficient performance but not prejudicial because jury would have convicted even had it not known).

Notably, neither *Ermert* nor *Hicks* holds that the failure to record a sidebar conference is ineffective assistance of counsel because it prevents appellate review. In both cases, the court was able to address the issues raised on appeal from the existing record. Here, Vaughn raises no issue or potential issue that we can address based on the existing record to show that counsel's failings prejudiced him.

II. Statement of Additional Grounds

Vaughn challenges several of the trial court's instructions to the jury and claims that he can raise them for the first time on appeal because they constitute a manifest constitutional error. The record shows that defense counsel acquiesced in all of these now challenged instructions, essentially precluding review. As our Supreme Court has observed:

> It is well-settled law that before error can be claimed on the basis of a jury instruction given by the trial court, an appellant must first show that an exception was taken to that instruction in the trial court. [CR 51(f); *Stewart v. State*, 92 Wn.2d 285, 298, 597 P.2d 101 (1979).] That rule is not a mere technicality. As we have explained clearly and often:
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> > CR 51(f) requires that, when objecting to the giving or

> refusing of an instruction, "[t]he objector shall state distinctly the matter to which he objects and the grounds of his objection". The purpose of this rule is to clarify, at the time when the trial court has before it all the evidence and legal arguments, the exact points of law and reasons upon which counsel argues the court is committing error about a particular instruction. *Dravo Corp. v. L.W. Moses Co.*, 6 Wn. App. 74, 83, 492 P.2d 1058 (1971); *see State v. McDonald*, 74 Wn.2d 141, 145, 443 P.2d 651 (1968). Therefore, the objection must apprise the trial judge of the precise points of law involved and when it does not, those points will not be considered on appeal. *Haslund v. Seattle*, [86 Wn.2d 607,] 614-15, [547 P.2d 1221 (1976)]; *Powers v. Hastings*, 20 Wn. App. 837, 848, 582 P.2d 897 (1978).
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> *Stewart v. State*, 92 Wn.2d 285, 298, 597 P.2d 101 (1979). Defense counsel did not comply with this basic rule.

State v. Bailey, 114 Wn.2d 340, 345, 787 P.2d 1378 (1990); *see also State v. Winings,* 126 Wn. App. 75, 89, 107 P.3d 141, 149 (2005) ("Under the doctrine of invited error, even where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording. *State v. Bradley,* 141 Wn.2d 731, 736, 10 P.3d 358 (2000); *In re Det. of Gaff,* 90 Wn. App. 834, 845, 954 P.2d 943 (1998)."). Nonetheless, we address each in turn to show that there was no error, much less constitutional error.

A. Jury Instructions 9 and 10.

Vaughn contends that instructions 9 and 10 charged two separate offenses and yet the court provided only one verdict form.

Instruction 9 provided: "A person commits the crime of driving while license revoked in the first degree when he or she, having been found by the Department of Licensing to be a habitual traffic offender, drives a motor vehicle while an order of revocation is in effect." Clerk's

Papers (CP) at 17. Instruction 10 provided:

> To convict the defendant of driving while license suspended in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
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> (1) That on or about the 20th day of December, 2005, the defendant drove a motor vehicle;
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> (2) That at the time of driving an order of revocation was in effect;
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> (3) That the order of revocation was based on a finding by the Department of Licensing that the defendant was a habitual traffic offender; and
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> (4) That the driving occurred in the State of Washington.
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> If you find from the evidence that [the] elements ha[ve] been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 18. The verdict form provided: "We, the jury, do find the defendant, HOWARD MATTHEW VAUGHN, Guilty of the crime of DRIVING WHILE LICENSE REVOKED IN THE FIRST DEGREE as charged in Count II." CP at 62.

The State charged Vaughn with "DRIVING WHILE IN SUSPENDED OR REVOKED STATUS IN THE FIRST DEGREE." CP at 4.

While the court's to-conviction instruction substituted "suspended" for "revoked" as it used in its definitional instruction and in its verdict form, this error was of no consequence. The to-convict instructions required proof that at the time Vaughn was driving, his driving privileges had been revoked. The State was held to its burden of proof and the evidence taken supports the verdict.

B. Instruction 16.

Vaughn next claims that instruction 16 relieved the State of its burden of proving the charges against him. That instruction provided: "I have admitted the original information filed

against Mr. Vaughn, but you may only consider this evidence for the limited purpose of whether or not Mr. Vaughn was charged with a crime. You must not consider this evidence for any other purpose." CP at 24.

This instruction referred to Exhibit 2, which the State introduced in order to prove that Vaughn had been charged with a crime at the time he failed to appear, an essential element of a bail jumping charge. According to Instruction 12, the State had to prove that "the defendant was being held for or was charged with ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE." CP at 20. The court's instruction properly limited the jury's consideration of the charging document as proof that the State had charged Vaughn with a crime. The instruction benefitted Vaughn; it did not lessen the State's burden of proof.

C. Instruction 4

Vaughn argues that because he entered a not guilty plea, the State had to prove every material allegation in the complaint. RCW 10.40.180. Instruction 4, he claims, improperly informed the jury that he had a prior conviction in violation of this rule. That instruction provided: "Evidence that the defendant has previously been convicted of a crime is not evidence of the defendant's guilt. Such evidence may be considered by you in deciding what weight or credibility should be given to the testimony of the defendant and for no other purpose." CP at 12. Vaughn appears to conclude that because the jury knew he had a prior conviction, it found him guilty, and thereby relieved the State of its burden of proving every material factual allegation.

The rules of evidence, specifically ER 609(a) and (b), allow the State to introduce a witness's prior convictions if the convictions were for crimes of dishonesty and occurred within

the last ten years. These convictions are admissible because crimes of dishonesty reflect on the witness's truthfulness. Had Vaughn chosen not to testify, the State would not have been able to present this criminal history to the jury but since he did, the trial court gave this instruction in order to protect Vaughn from any potential prejudice the jury might harbor knowing about these convictions. We presume that the jury followed the court's instructions and considered these prior convictions only in assessing Vaughn's credibility as a witness. *State v. Lough,* 125 Wn.2d 847, 864, 889 P.2d 487 (1995).

B. Pretrial Photographic Identification.

Vaughn argues that counsel denied him his right to effective assistance by failing to object to the admission of a photograph that Sivankeo identified as the booking photograph he used to identify Vaughn as the truck's driver. Vaughn argues that Sivankeo should have required his partner to put together a photo montage once he learned Vaughn's name and before looking at the booking photograph and, from that, Sivankeo should have tried to pick out the driver. To do otherwise, he suggests, uses an impermissibly suggestive identification procedure that gives rise to a very substantial likelihood of misidentification. *Simmons v. United States,* 390 U.S. 377, 384, 88 S. Ct. 971, 19 L. Ed. 2d 1247 (1968).

We review the admission of photographic identification evidence for an abuse of discretion. *State v. Kinard*, 109 Wn. App. 428, 432, 36 P.3d 573 (2001). This case does not involve the typical circumstance where a witness identified a suspect in a photomontage. Here, not only did Vaughn fail to object to admission of the booking photograph, he also did not object to Sivankeo's testimony. In any case, an objection would have been futile because Sivankeo was

simply explaining the steps in his investigation and he properly explained to the jury why he suspected Vaughn was the driver. It was the jury's decision, and the jury's alone, to decide if Sivankeo could have been wrong in his identification. Defense counsel argued ardently in his closing argument that Sivankeo made a mistake. The trial court properly admitted the evidence. We find no abuse of discretion.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Van Deren, C.J.

Quinn-Brintnall, J.